

Decision 05-06-049 June 30, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338) Regarding the Future Disposition of the Mohave Generating Station.

Application 02-05-046
(Filed May 17, 2002)

**OPINION GRANTING INTERVENOR COMPENSATION TO
THE UTILITY REFORM NETWORK FOR SUBSTANTIAL
CONTRIBUTIONS TO DECISION 04-12-016**

Summary

This decision awards The Utility Reform Network (TURN) \$95,667.71 in compensation for its contribution to Decision (D.) 04-12-016.

Background

The Mohave Generating Station (Mohave) is a two-unit, coal-fired power plant located in Laughlin, Nevada. Southern California Edison Company (SCE) is the plant operator and owns a 56% undivided interest in Mohave which entitles SCE to approximately 885 Megawatts (MW). Pursuant to the terms of a 1999 Consent Decree¹ specific environmental controls must be installed at Mohave for it to continue in operation post 2005. On May 17, 2002, SCE filed an

¹ Mohave Environmental Consent Decree settled a federal civil lawsuit, CV-S-98-00305-LDG (RJJ), that was filed in 1997 by Grand Canyon Trust, Inc., Sierra Club, Inc., and National Parks and Conservation Association, Inc. against SCE and the other Mohave co-owners alleging various air quality violations at Mohave. SCE and the other co-owners were signatories to the 1999 Consent Decree.

application seeking Commission authorization to either make the necessary environmental expenditures, or close the plant.

Mohave obtains all of its coal supply from the Black Mesa coal mine which is located approximately 273 miles east of Mohave in northeast Arizona. The mine is on lands of the Hopi Tribe and Navajo Nation. The coal is transported from the mine to Mohave by a coal-slurry pipeline that requires that the coal be pulverized and mixed with water near the mine site to produce the slurry. Once the slurry mixture reaches Mohave, the water is extracted and the coal is dried. The water source for the slurry process and for all other water requirements of the mine is the N-Aquifer. The aquifer and a well serving it are also on the land of the Hopi Tribe and Navajo Nation.

Approximately 4,400 acre-feet per year is extracted from the N-Aquifer to slurry the coal. The Hopi Tribe opposes the further pumping of the N-Aquifer after 2005. Beginning in 2001, SCE and the other Mohave co-owners restarted past efforts to develop an alternative water source to the N-Aquifer for the slurry line. During the pendency of SCE's application, the parties determined that the only potentially viable alternative is the C-Aquifer. In addition to the uncertain water supply, coal supply, has also come into question.

In D.04-12-016, the Commission, among other actions, authorized SCE to continue working on resolution of the essential water and coal issues, including the funding of the C-Aquifer hydro-geological and environmental studies. Once the questions of available water and coal are assessed, the Commission will review those costs and determine if it can make a final decision on the future of Mohave as a coal-fired plant.

Numerous parties participated in this proceeding, including: The Navajo Nation, Hopi Tribe, Salt River Agricultural Improvement and Power

District, the Center for Energy and Economic Development, The Utility Reform Network (TURN), Office of Ratepayer Advocates (ORA), NRDC and Water and Energy Consulting (WEC).

Nine parties filed protests to SCE's application. On October 11, 2002, a combined Prehearing Conference (PHC) and Public Participation Hearing (PPH) was held at the Navajo Chapter House in Tuba City, Arizona. On January 7, 2003, the assigned Commissioner issued a Scoping Memo; a second PHC was held May 23, 2003, evidentiary hearings were held June 14 through July 9, 2004; post hearing concurrent and reply briefs were filed August 9 and August 24, 2004, respectively; the proposed decision (PD) was mailed on October 20, 2004; final oral argument (FOA) was heard on November 30, 2004; comments and reply comments to the PD were received, and on December 2, 2004, the Commission issued its decision in the proceeding. No applications for rehearing or petitions for modification were filed. The proceeding is closed.

As TURN states, reading the procedural history section of D.04-12-016 indicates, "this proceeding did not follow a typical course."² The proceeding had multiple PHCs, meetings outside the state, and numerous rounds of briefs and testimony on a myriad of issues over the two and one-half years it was pending before the Commission. TURN actively participated in this proceeding and focused on a wide array of the multitude of issues raised by the application. The primary focus of TURN's testimony involved the numerous uncertainties that required resolution before the Commission would be in a position to assess

² TURN claim for compensation, dated February 1, 2005, p. 2.

whether retrofitting Mohave would serve SCE ratepayer interests, and on whether restarting Mohave as a coal-burning plant might not be the most efficient option.

Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceeding. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers.

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the PHC (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate "significant financial hardship." (§§ 1802(g), 1804(b)(1).)
5. The intervenor's presentation must have made a "substantial contribution" to the proceeding, through the adoption, in whole or in part, of the intervenor's contention or recommendations by a Commission order or decision. (§§ 1802 (h), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable

training and experience and offering similar services.
(§ 1806.)

For discussion here, the procedural issues in Items 1 – 4 above are combined, followed by separate discussions on Items 5 and 6.

Procedural Requirements

The initial PHC in this matter was held on October 11, 2002, and a second PHC was held on May 23, 2003. TURN timely filed its NOI on June 10, 2003, within 30 days of the second PHC. In its NOI, TURN addressed its anticipated scope and cost of participation, customer status and significant financial hardship. TURN timely filed its request for compensation on February 1, 2005, within 60 days of D.04-12-016 being issued. TURN's request for compensation includes a description of its substantial contribution to the decision, as well as a detailed description of services and expenditures.

An Administrative Law Judge (ALJ) ruling dated July 8, 2003, found TURN was a customer pursuant to § 1802(b), met the requirement for financial hardship pursuant to § 1804(a)(2)(B), and therefore was eligible for intervenor compensation in this proceeding.

Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding we look at several things. First, did the ALJ or Commissioner adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the intervenor? (*See* § 1802(h).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (*See* §§ 1802(h),

1802.5.) As described in § 1802(h), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.³

Should the Commission not adopt any of the customer's recommendations, compensation may be awarded, if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order.⁴ With this guidance in mind, we turn to the claimed contributions TURN made to the proceeding. TURN claims and we find that

D.04-12-016:

- Agreed with TURN that SCE should be authorized to make critical path investments to determine whether water and coal supplies can be adequately resolved prior to seeking approval of plant refurbishment.⁵
- Adopted TURN's proposal to limit SCE's recovery of interim critical path costs to 56% of total expenditures for

³ D.98-04-059, 79 CPUC 2d, 628 at 653.

⁴ See D 03-12-019, discussion D.89-03-063 (31 CPUC 2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

⁵ D.04-12-016, Ordering Paragraph #1; TURN opening brief, pp. 7-8.

- Mohave (consistent with its ownership share) with the exception of costs incurred for the alternative study.⁶
- Agreed with TURN and removed from the Proposed Decision (PD) references to the applicability of Assembly Bill (AB) 57 cost recovery protection to investments in utility retained generation.⁷
 - Clarified, as requested by TURN, that in finding the capital cost estimates reasonable, we were merely adopting a cap and not authorizing SCE to expend funds to proceed with the actual refurbishments.⁸
 - Based on TURN's arguments, explicitly declined to adopt a finding of up-front reasonableness for unspecified future financing, operation, fuel and contingency costs.⁹
 - Agreed with TURN's concern that significant changes in SCE's customer base "due to core/non-core, community aggregation, municipalization or direct access" could cause a refurbished Mohave to become surplus capacity and thereby severely diminish the project's cost-effectiveness.¹⁰
 - Echoed TURN's belief that, absent cost data for water and coal, "neither the Commission, nor the parties, can make an informed determination as to the efficiencies of Mohave *vis-à-vis* any alternatives."¹¹
 - Agreed with TURN that alternatives have not been adequately addressed and adopted TURN's proposal for further consideration of alternatives to Mohave, specifically a comparison of the WEC solar proposal and

⁶ D.04-12-016, p. 60, Ordering Paragraph #2; TURN opening brief, p. 8.

⁷ D.04-12-016, p. 19; TURN reply comments on PD, pp. 1-2.

⁸ D.04-12-016, pp. 19-20; TURN reply comments on PD, pp 2-3.

⁹ D.04-12-016, p. 59, *See* TURN opening brief, p. 10.

¹⁰ D.04-12-016, p. 51; TURN opening brief, pp. 26-28.

¹¹ D.04-12-016, p. 51 TURN opening brief, pp. 5-6, 16-17, 28.

the NRDC IGCC plant, and ordered SCE to undertake a feasibility study of options that provide economic benefits to the Hopi Tribe and Navajo Nation and could replace Mohave in the event of a permanent shutdown.¹²

- Agreed with TURN that the granting of any of the “conditional CPCN” proposals outlined by the Hopi, and Peabody, is unreasonable because such an approval could undermine ongoing negotiations, fail to provide clarity on the scope of the “all-in levelized cost” cap of \$46/MWh that would apply to ongoing operations at Mohave, and limit the Commission from subsequently determining whether utility expenditures at the facility are “reasonable and prudent.”¹³
- Agreed with TURN that the proper period for modeling the cost-effectiveness of Mohave operations is 17-20 years based on the lack of cooling water post-2026, and that SCE’s estimates do not include a variety of environmental compliance costs that may be incurred to continue operating the facility.¹⁴
- Agreed with TURN that, in submitting any proposal for authorization to proceed with the Mohave refurbishment, SCE must provide an estimate of future carbon regulation costs which will be “factored” into the final determination of Mohave costs effectiveness.¹⁵

The Commission has awarded full compensation even where the intervenor’s positions were not adopted in full, especially in proceedings with a broad scope.¹⁶ Here, however, TURN achieved a high level of success on the

¹² D.04-12-016, pp. 52-54, Ordering Paragraph #3; TURN opening brief, pp. 28-31, 33-35.

¹³ D.04-12-016, pp. 56-57.

¹⁴ D.04-12-016, p. 16, TURN opening brief, pp. 5-6, 18-24.

¹⁵ D.04-12-016, p. 17, TURN opening brief, pp. 20-23.

¹⁶ *See, e.g.*, D.98-04-028, 79 CPUC 2d 570, 573-574.

issues it raised. The proceeding and the Commission's final decision benefited from TURN participation.

As described above, TURN made a substantial contribution to this proceeding. We now determine whether TURN's compensation request is reasonable.

Reasonableness of Requested Compensation

TURN requests \$95,667.71 for its participation in this proceeding. TURN's request is itemized in Attachment A.

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

Also, D.98-04-059 directed intervenors to demonstrate productivity by assigning a reasonable dollar value to the benefits of their participation to ratepayers. The costs of an intervenor's participation should bear a reasonable relationship to the benefits realized their participation. This showing assists us in determining the overall reasonableness of the request.

TURN documented its claimed hours by presenting a daily breakdown of the hours of its attorneys, policy analysts and experts, along with a brief description of each activity. Given the scope of TURN's participation and the work products prepared the number of claimed hours is reasonable. Since we find that TURN's efforts made a substantial contribution to the decision, we need not exclude from TURN's award any compensation for specific issues.

Although we adopted many of TURN's recommendations, it is difficult to attribute specific quantifiable benefits to its participation. Over the life of

Mohave, or alternatives, however, net financial savings in many areas recommended by TURN will likely exceed the intervenor compensation claim. For example, only authorizing critical path items that will keep the “Mohave open” option alive now, rather than authorizing the entire \$1.2 billion in retrofits may prove to be a prudent course of action. Advising the Commission not to adopt a finding of up-front reasonableness for unspecified future financing, operation, fuel and contingency costs is also prudent. In addition, limiting SCE’s recovery of interim critical path costs to 56% of total expenditures for Mohave (consistent with its ownership share) may prove to be economical in the long run. In view of the above, we find TURN’s efforts have been productive.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons. In this proceeding, TURN used five attorneys and three expert witnesses.

Attorneys

TURN requests hourly rates of \$200, \$250 and \$270 for Marcel Hawinger for work he conducted in 2002, 2003 and 2004, respectively. For 2002 and 2003, the requested rates are the same as those previously approved by the Commission.¹⁷ For 2004, the rate requested for Hawiger is the 2003 rate, increased by an 8% escalation factor, per our direction in Resolution ALJ-184.¹⁸

TURN requests an hourly rate of \$270 for Matthew Freedman for 2004. This is an 8% increase to his Commission approved rate for 2003.¹⁹

¹⁷ D.02-09-040 for 2002 rates and D.04-05-048 for the 2003 rates.

¹⁸ See Attachment 2, p. 7 of R.04-10-010, dated October 7, 2004.

¹⁹ D.04-05-050.

TURN requests \$95/hour for work performed by Hayley Goodson, as a law clerk, in 2002, and \$190/hour for 2003 and 2004 for her work as a staff attorney for TURN. The Commission previously approved these rates in D.03-05-065 and D.04-12-033.

TURN requests hourly rates of \$340, \$365 and \$395 for work performed by Robert Finkelstein in 2002, 2003 and 2004, respectively. The requested rates for 2002 and 2003 were previously approved²⁰ and the rate for 2004 is an 8% increase to the 2003 rate.

TURN requests \$470/hour for work performed by Mike Florio for 2004, a rate previously approved by the Commission for his work for that year.²¹ We approve all of the above requested rates in this proceeding.

Expert Witness Fees and Related Expenses

TURN seeks to recover \$18,476.60 in costs billed to TURN by JBS Energy, Inc. for expert witness services provided by William Marcus and Jim Helmich. The requested rate per hour for Marcus is \$175, \$185 and \$195 for services rendered during 2002, 2003 and 2004 respectively. The rates requested for Helmich are \$150, \$150 and \$160 for work performed in 2002, 2003 and 2004 respectively.

Prior awards of intervenor compensation established the 2002 and 2003 rates for Marcus and a 2003 rate for Helmich. TURN is asking the Commission to establish a 2004 rate for Marcus and 2002 and 2004 rates for Helmich.

In support of the request for establishing new rates, TURN references other expert witnesses who appeared in other Commission proceedings to

²⁰ D.03-01-074 for 2002 and D.03-08-041 for 2003.

²¹ D.05-01-029.

extrapolate market rates for the TURN witnesses. TURN presents evidence that the historic hourly rates charged by other participants in the same market of energy regulatory consultants ranges from \$173 to \$240. The request for Marcus of \$195 for 2004, based on his experience in the field, is well within range of other experts. We find the requested rate of \$195 for Marcus for 2004 reasonable.

TURN requests approval of a rate of \$150/hour for 2002 and \$160/hour for 2004 for Helmich. The 2004 request is 7% over the Commission approved rate for 2003. The request of \$150/hour for 2002 appears reasonable both in light of the Commission's approval of \$150/hour for 2003, and in light of the historic hourly rate range. We approve the rates as requested by TURN for Marcus and Helmich.

The incidental costs for TURN's participation in this proceeding, including reproduction, postage, telephone, facsimile, research and travel to Tuba City, Arizona for the October 11, 2002, PHC are all reasonable, were necessarily incurred to enable TURN to participate in the proceeding, and should be compensated in full.

Award

We award TURN \$95,667.71, as set forth in Attachment A.

Consistent with previous Commission decisions, we will order that interest be paid on the award amount²²commencing the 75th day after TURN filed its compensation request and continuing until full payment of the award is made.

²² At the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15.

We remind all intervenors that Commission staff may audit their records related to this award, and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. TURN's records should identify specific issues for which it requested compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for this decision.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Carol A. Brown is the assigned ALJ in this proceeding.

Findings of Fact

1. TURN represents consumers, customers, or subscribers of SCE, a utility regulated by the Commission.
2. TURN has previously been found eligible for intervenor compensation for its contribution to Commission decisions, for example in D.04-05-050, D.02-09-040, D.04-05-048, D.03-01-074, D.03-08-041 and D.05-01-029.
3. TURN filed a timely NOI on June 10, 2003, following a PHC on May 23, 2003.
4. On July 8, 2003, pursuant to an ALJ ruling, TURN was found to be eligible for an award of intervenor compensation.
5. TURN timely filed its request for intervenor compensation on February 1, 2005, within 60 days of D.04-12-016 being issued.

6. No objection was filed to TURN's NOI or claim for compensation.
7. TURN made a substantial contribution to D.04-12-016.
8. TURN's requested hourly rates for attorneys and experts are reasonable when compared to the market rates for persons with similar training and experience.
9. The total of these reasonable fees and costs is \$95,667.71.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed fees and expenses incurred in making substantial contributions to D.04-12-016.
2. The comment period should be waived, and today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$95,667.71 as compensation for its substantial contributions to Decision 04-12-016.
2. Within 30 days of the effective date of this decision, Southern California Edison Company (SCE) shall pay this award to TURN.
3. SCE shall also pay interest on the award beginning April 18, 2005, at the rate earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, and continuing until full payment is made.
4. The comment period for today's decision is waived.

This order is effective today.

Dated June 30, 2005, at San Francisco, California.

MICHAEL R. PEEVEY

President

GEOFFREY F. BROWN

SUSAN P. KENNEDY

DIAN M. GRUENEICH

Commissioners

Commissioner John A. Bohn, being necessarily absent,
did not participate.

Attachment A**TURN Attorney Fee**

		Hours	Hourly Rate	Total
Marcel Hawiger				
	2002	25.45	\$200	\$5,090.00
	2003	48.5	\$250	\$12,125.00
	2004	2	\$270	\$540.00
	comp2003	0.5	\$100	\$50.00
Robert Finkelstein				
	2002	10.5	\$340	\$3,570.00
	2003	0.25	\$365	\$91.25
	2004	17.25	\$395	\$6,813.75
	comp2003	10	\$197.50	\$1,975.00
Hayley Goodson				
	2002	22	\$95	\$2,090.00
	2003-04	61	\$190	\$11,590.00
Mike Florio				
	2004	0.5	\$490	\$245.00
Matt Freedman				
	2004	114.75	\$270	\$30,982.50
	comp2004	1.5	\$135	\$202.50
		Subtotal		\$75,365.00

Expert Witness Fees and Expenses

JBS Energy				
Bill Marcus				
	2002	1.33	\$175	\$232.75
	2003	16.65	\$185	\$3,080.25
	2004	16.18	\$195	\$3,155.10
Jim Helmich				
	2002	23.55	\$150	\$3,532.50
	2003	38	\$150	\$5,700.00
	2004	16.75	\$160	\$2,680.00
Expenses				\$96.00
		Subtotal		\$18,476.60

TURN Expense

Copies				\$944.60
Postage				\$138.29
Fax/Phone				\$32.05
Lexis				\$17.81
Atty travel – air and car rental				\$460.00
Atty hotel				\$233.36
		Subtotal		\$1,826.11

Grand Total	\$95,667.71
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(END OF ATTACHMENT A)